WEIL, GOTSHAL & MANGES LLP
SUITE 700
1615 L STREET, N.W.
WASHINGTON, D.C. 20036-5610
(202) 682-7000
FAX: (202) 857-0940

DALLAS
HOUSTON
MENLO PARK
(SILICON VALLEY)
MIAMI
NEW YORK

BRUSSELS
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March 19, 1998

VIA HAND DELIVERY

The Honorable Lewis Hall Griffith
The Honorable Jeffrey S. Gulin
The Honorable Edward Dreyfus
c/o Gina L. Giuffreda, CARP Specialist
Office of the Register of Copyrights
Room LM-403
James Madison Memorial Building
101 Independence Avenue, S.E.
Washington, D.C. 20540

Re: Noncommercial Educational Broadcasting Compulsory License, Docket No. 96-6 CARP NCBRA

Dear Judges Griffith, Gulin, Dreyfus:

This letter is submitted in response to the objection raised by ASCAP and BMI to the admission into evidence of prior agreements between (1) ASCAP and the National Federation of Community Broadcasters and the National Religious Broadcasters Music License Committee (PB 7X); (2) ASCAP and the American Council of Education (PB 8X); and (3) BMI and the National Federation of Community Broadcasters and the National Religious Broadcasters Music License Committee (PB 17X). As explained below, these agreements are indisputably matters of public record which have been filed with the Copyright Office and are, therefore, admissible under the evidentiary rules governing this proceeding.

The rules of evidence governing this proceeding, set forth in 37 C.F.R. § 251.48, are absolutely clear that a party may rely upon any document "already on file with [the Panel] or the Copyright Office." See 37 C.F.R. § 251.48(c). Indeed, if the document has been filed with the Copyright Office, the offering party is not even required to produce the document and

may, instead, merely refer the Panel to the public filings. It is undisputed that each of the documents at issue here have been filed with the Copyright Office. In fact, the terms set forth in those agreements have also been published in the Federal Register. See 62 FR 63502 (Dec. 1, 1997). They are, therefore, admissible.

Further, § 118(b)(3) of the Copyright Act states that agreements between copyright owners and public broadcasting entities entered into at any time are admissible. Congress thus explicitly determined that prior voluntary agreements may be highly relevant to the Panel's determination of appropriate royalty rates in subsequent proceedings. As the agreements at issue deal with the very music rights that are the subject of this proceeding, the Panel should be able to consider them.

In any event, ASCAP's and BMI's position is contradicted by BMI's own use of these prior agreements in its direct case through the testimony of Fredric J. Willms. See Testimony of Fredric J. Willms at 26, n.21. By relying on these agreements to support its position with regard to an appropriate fee, BMI has opened the door to their admissibility under the curative admissibility doctrine, which holds that a party's prior introduction of inadmissible evidence estops that party from later objecting to the introduction of related inadmissible evidence by the other party. See, e.g., United States v. Rosa, 11 F.3d 315, 335 (2d Cir. 1993); see generally 1 Wigmore on Evidence § 15 (Tillers rev. 1983). Thus, even if these prior agreements were inadmissible -- which they are not under the CARP rules -- the Panel should reject the double standard being advocated here.

We anticipate that ASCAP and BMI will argue that because these documents contain provisions indicating that they were entered into on a "non-prejudicial and non-precedential basis" they should be inadmissible. 37 C.F.R. § 251.48 does not, however, contain any exception as to the admissibility of documents publicly filed with Copyright Office (and published in the Federal Register) based upon internal language contained in the document itself. Any such language, at most, has an impact on the weight to be afforded the document by the Panel, but does not in any way preclude its admission.

Indeed, the exclusion from evidence of arm's-length agreements containing "non-prejudicial and non-precedential" language would have a chilling effect on future CARP proceedings. If the mere inclusion of such language makes an agreement which

is a matter of public record inadmissible, one would expect all future agreements to contain this language, thereby depriving future CARP Panels of any prior bargaining history on which to base their determinations of reasonable fees.

Respectfully,

Jonathan T. Weiss

cc: Philip Schaeffer, Esq.
Norman C. Kleinberg, Esq.